

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MILDRED A. AMEY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Dayton, OH

*Docket No. 03-933; Submitted on the Record;  
Issued July 11, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has established that she has greater than a 76 percent permanent impairment of the right lower extremity for which she has received schedule awards.

The Office of Workers' Compensation Programs accepted that on January 19 and May 21, 1970 appellant, a former nursing assistant, born April 3, 1940 sustained a right ankle sprain in the performance of duty. The Office accepted that she later suffered a recurrence of disability on May 21, 1970 of the work injury from July 16 to September 7, 1981 and that she also developed chronic ligamentous instability of the right ankle and lymphoma of the sinus tarsi, which required surgery as a result of her work injuries. Appellant was off work until October 19, 1981. She terminated her employment with the employing establishment on March 12, 1982 for reasons unrelated to the accepted employment injuries. Appellant was employed in the private sector from 1985 until her permanent retirement on May 1, 1997.

On or about June 15, 1982 the Office issued appellant a schedule award for 10 percent permanent impairment of the right lower extremity as a result of the May 21, 1970 injury for the period of January 21 to August 10, 1982. On January 9, 1998 she received an additional schedule award for a 66 percent impairment of the right lower extremity for the same injury from August 11, 1997 to April 2, 2001.

On January 10, 2001 appellant filed a CA-7, claim for compensation. In an accompanying statement, she asserted that she required continuing compensation for her ongoing work-related disability. Appellant submitted additional medical evidence with the request. She later claimed that she was entitled to an additional schedule award.

On April 25, 2001 the Office contacted Dr. Kimberly Bethel-Murray, appellant's attending physician, to determine the extent of her permanent impairment of the right ankle due to the employment injury. The Office advised the physician of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) was the appropriate standard for evaluating impairment of appellant's ankle and attached a form to

assist her with the requested rating. On May 3, 2001 Dr. Bethel-Murray returned the Office form dated April 30, 2001. She indicated that appellant reached maximum medical improvement on September 7, 1997. The form furnished by the Office indicated that the average range of dorsi-plantar flexion was 60 degrees and the average range of inversion-eversion was 50 degrees. Dr. Bethel-Murray noted on the form that appellant could only dorsiflex and plantar flex to less than 10 degrees and invert from neutral to 5 degrees and evert from neutral to zero degrees. She indicated that ankylosis was present at 80 degrees and determined that there was additional impairment of function due to weakness, atrophy, pain or anesthesia estimated at 100 percent. Dr. Bethel-Murray concluded on the form that appellant had an impairment of 100 percent of the right lower extremity.

A district medical adviser reviewed Dr. Bethel-Murray's impairment rating and determined that a rating of 100 percent impairment of the right lower extremity was incorrect. The district medical adviser noted further that an ankylosis ankle means no motion and that appellant, therefore, could not have a plantar flexion and dorsiflexion of less than 10 degrees as stated on the form. The district medical adviser utilized the range of motion calculations provided by Dr. Bethel-Murray and determined appellant's impairment based on Tables 17-11 and 17-12 on page 537 of the fifth edition of the A.M.A., *Guides*. The district medical adviser found that appellant sustained a 30 degree impairment for dorsiflexion, a 7 degree impairment for plantar flexion, a 5 degree impairment based on inversion and a 2 percent impairment based on 0 eversion for a total of 39 percent impairment of the right lower extremity.

On June 6, 2001 the Office advised Dr. Bethel-Murray of the district medical adviser's finding that, based on the range of motion figures presented in her April 30, 2001 form, appellant would not have established 100 percent permanent impairment of the right lower extremity according to the fifth edition of the A.M.A., *Guides*. The Office requested that she provide a complete calculation or appropriate references to the A.M.A., *Guides*.

In a report dated June 19, 2001, Dr. H. Lee King, a Board-certified orthopedic surgeon, responded that Dr. Bethel-Murray was appellant's internist and that she was her orthopedist, who had treated appellant for over 20 years for the right ankle injury. He then reviewed the examination findings of appellant's right lower extremity and provided an impairment evaluation. Dr. King stated:

"[Appellant] has a 62 percent impairment of the right lower extremity and 88 percent ankle impairment of the right lower extremity. These calculations were obtained from the [f]ourth [e]dition of the A.M.A., *Guides* [sic]. The page number is 80; the table that was utilized was Table 57, 'Ankle Impairment from Ankylosis in a Valgus Position.' The percentage of impairment that was utilized in Table 57 was 21 degrees whole person, 52 degrees for the lower extremity, 74 degrees for the right ankle. Those percentages were added to the neutral position of an ankylosis ankle, which would be an additional 4 percent for a whole person impairment giving a 25 percent whole impairment. The 10 percent added to the 52 percent in Table 57 would give her a lower extremity impairment of 62 percent and 14 percent impairment if ankylosis in a neutral position, however, was added to the 74 percent due to the 30 degrees of valgus ankylosis giving an ankle

impairment rating of 88 percent. Those are the means of calculating the percentage of impairment for [appellant].”

At the end of his report, Dr. King stated: “I wish to reiterate that [appellant] has a permanent impairment rating of 25 percent whole person, 66 percent of the right lower extremity and 88 percent right ankle impairment.”

The case was reviewed by an Office medical adviser, who, in a report dated July 5, 2001, applied the fifth edition of the A.M.A., *Guides*, the newest guidelines utilized by the Office to determine impairment for schedule award purposes. The Office medical adviser agreed with Dr. King’s first determination that appellant had a 62 percent permanent impairment of the right lower extremity.

By decision dated October 3, 2001, the Office found that the medical evidence failed to demonstrate that appellant had any additional permanent impairment of the right lower extremity that was previously awarded. In a letter dated October 31, 2001, appellant, through counsel, requested an oral hearing.

During the hearing, held August 28, 2002, appellant, who was represented by counsel, testified in support of her claim for an additional schedule award. The Office hearing representative held the record open for 30 days for the submission of new evidence.

Appellant’s counsel submitted a magnetic resonance imaging (MRI) scan of appellant’s lumbar spine and another of her right knee performed July 18, 2001, which showed a macerated lateral meniscus, tricompartmental osteophytes and high grade chondromalacia along the patellofemoral joint and lateral tibial femoral compartment.

Appellant’s counsel further submitted a post-hearing report dated September 6, 2002 from Dr. King, who provided an impairment rating based upon the fifth edition of the A.M.A., *Guides* utilizing the range of motion and ankylosis in a valgus position. He stated:

“The initial reference to [appellant’s] problem can be found in [C]hapter 17, page 41, with the following subtext: ‘The optimum ankylosis position is the neutral position without flexion or extension -- varus or valgus.’ Ankylosis of the ankle in the neutral position is a 4 percent whole person impairment, a 10 percent lower extremity impairment and a 14 percent foot impairment. A variation from neutral position should be evaluated according to the tables which are 1724 through 1728. The maximum impairment is 25 percent whole person impairment, 62 percent lower extremity impairment and 88 percent ankle impairment.

“The range of motion [is] zero because the ankle is ankylosis. It is not ankylosis in a neutral position which automatically would be a four percent impairment. However, she [i]s ankylosis in a 30 plus degree valgus position that gives another 21 percent, [appellant] has a whole person permanent impairment of 25 percent. Utilizing the gait analysis with a moderate degree of lower extremity derangement [appellant] would fall somewhere in the neighborhood between a 20 and a 30 degree whole person impairment. Therefore, I feel [she] indeed does have a 25 percent whole person impairment. The chart utilized for the gait analysis was

[T]able 17-5, 'Lower Limb Impairment Due To Gait Derangement' on page 529, Chapter 17 of the [A.M.A., *Guides*]."

By decision dated November 22, 2002, an Office hearing representative affirmed the prior decision, finding upon review of the medical evidence and testimony that the record failed to support that appellant was entitled to greater than 76 percent permanent impairment for the right lower extremity for which she had already received schedule awards.

The Board has reviewed the case record including appellant's contentions on appeal and finds that she is entitled to no more than a 76 percent permanent impairment of her right lower extremity, for which she has received schedule awards.

Section 8107 of the Federal Employees' Compensation Act<sup>1</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>2</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>3</sup> The Act's implementing regulation has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule award losses.<sup>4</sup>

In this case, appellant has received two schedule awards totaling 76 percent permanent impairment for the right lower extremity as a result of her 1970 employment injuries. Following a request for an additional schedule award, the Office received an impairment rating from Dr. King, a Board-certified orthopedic surgeon, who initially determined in his June 19, 2001 report, that appellant had a 62 percent right lower extremity impairment and then concluded that she had a 66 percent impairment. In any case, the Board notes that he used the fourth edition of the A.M.A., *Guides* in making his assessment. The Board has held that a medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's permanent impairment.<sup>5</sup> Because Dr. King's opinion was based on the fourth edition of the A.M.A., *Guides*, the Office properly reviewed his examination findings and determined a proper impairment rating.<sup>6</sup> On July 5, 2001 the Office medical adviser determined then that appellant had a 62 percent impairment, less than that already awarded and the Office consequently denied appellant's claim for additional compensation. Following an oral hearing, made at appellant's request, Dr. King submitted the most recent

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<sup>1</sup> 5 U.S.C. §§ 8101-8109.

<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

<sup>5</sup> *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999).

<sup>6</sup> See *Denise D. Cason*, 48 ECAB 530, 531 (1997). Further, the Board notes that the fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date.

report dated September 6, 2002, utilizing the fifth edition of the A.M.A., *Guides*, which the Board notes conforms with the Office medical adviser's July 5, 2001 finding appellant had a 62 percent impairment of the right lower extremity.

The fifth edition of the A.M.A., *Guides* points out that lower extremity impairment can be evaluated by assessing range of motion of its joints. Because examination of appellant's range of motion revealed that her ankle joint was immobile or ankylosed as a result of the injury and her surgical procedure, its position was also evaluated. The A.M.A., *Guides* outlines that the optimal ankylosis position is the neutral position without flexion, extension, varus or valgus. Ankylosis of the ankle in the neutral position is noted as a 10 percent lower extremity impairment.<sup>7</sup> Examination of appellant's right lower extremity revealed that her right ankle is ankylosed in a valgus position, (bent outward), of 30 plus degrees and Table 17-26 in the fifth edition of the A.M.A., *Guides* assesses ankle impairment from ankylosis in a valgus position. Table 17-26 provides that the lower extremity impairment due to ankylosis in valgus equals 52 percent.<sup>8</sup> The 10 percent lower extremity impairment of the neutral position is then added to the ankle impairment, which yields a total of 62 percent impairment of the right lower extremity. The Office medical adviser, in his July 5, 2001 report, properly determined that appellant had 62 percent right lower extremity impairment and appellant has failed to establish entitlement to a higher impairment rating.

Inasmuch as the Office properly applied the fifth edition of the A.M.A., *Guides* to the medical evidence, appellant is entitled to no more than a 76 percent permanent impairment of her right lower extremity.

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<sup>7</sup> A.M.A., *Guides* page 541.

<sup>8</sup> A.M.A., *Guides*, Table 17-26 at page 541.

The November 22, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
July 11, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member